

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

RICHARD R. GATES,

3:16-cv-00321-MMD-CBC

Plaintiff,

v.

**REPORT AND RECOMMENDATION
OF U.S. MAGISTRATE JUDGE**

R. LEGRAND, *et al.*,

Defendants.

This Report and Recommendation is made to the Honorable Miranda M. Du, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4.

This case involves a civil rights action filed by Plaintiff Richard R. Gates ("Gates") against Defendants Richard LeGrand, Sheryl Foster, Bruce Harkreader, and Valaree Olivas (collectively referred to as "Defendants"). Currently pending before the Court is a motion for summary judgment filed by Defendant Foster, which was joined entirely by Defendants Harkreader and LeGrand, and in part, by Defendant Olivas. (ECF Nos. 20; 28; 30.) Gates opposed, (ECF No. 31), and Defendants replied (ECF No. 33). Having thoroughly reviewed the record and papers, the Court hereby recommends Defendants' motion for summary judgment, and joinders thereto, be granted.

I. BACKGROUND AND PROCEDURAL HISTORY

A. Procedural History

Gates is an inmate in the custody of the Nevada Department of Corrections ("NDOC") and is currently housed at Lovelock Correctional Center ("LCC"). On February 14, 2017, Gates filed his first amended complaint, which asserted three claims for relief. (ECF No. 5.) Pursuant to 28 U.S.C. § 1915(A)(a), the Court screened Gate's FAC and allowed him

1 to proceed with three claims for relief. (ECF No. 7.) These claims center on alleged
2 wrongs allegedly suffered by Gates related to his Wiccan religious practices.

3 Specifically, Gates alleges he was not allowed to possess amber fragrant resin
4 granular incense, which he claims was necessary to his religious practices. Gates asserts
5 that while he was allowed to order the incense by LCC officials, when the incense arrived
6 it was taken by LCC officials. Gates claims Defendant Olivas, a Correctional Officer
7 Lieutenant at NDOC, issued an unauthorized property notification for the incense, informing
8 him the incense was not permitted pursuant to NDOC Administrative Regulation 810, which
9 governs religious faith groups' activities and programs at all NDOC institutions. (ECF No. 7.
10 at 4:9-12.) Gates also claims he filed a grievance with prison officials regarding the
11 unauthorized property notification for the incense and the grievance was denied at each level.
12 (*Id.* at 4:15-16.) Gates alleges Defendant Harkreader, a Correctional Caseworker Specialist
13 at NDOC, denied the informal level grievance; Defendant LeGrand, Warden of Lovelock
14 Correctional Center, denied the first level grievance; and Defendant Foster, Deputy Director
15 of the NDOC, denied the second level grievance. (*Id.* at 4:16-17.)

16 Based on this conduct, Gates has alleged three Counts: 1) a First Amendment
17 Free Exercise Clause claim against Defendants Olivas, Harkreader, LeGrand, and
18 Foster; 2) a Fourteenth Amendment Equal Protection Clause claim against Defendants
19 Olivas, Harkreader, LeGrand, and Foster; and 3) a Fourteenth Amendment Due Process
20 Clause claim against Defendants Olivas, Harkreader, LeGrand, and Foster. Each Count
21 has been permitted to proceed against Defendants Foster, Harkreader, and LeGrand
22 based solely on their denial of Gate's Grievance No. 2006-29-84240.

23 B. Defendants' Motion for Summary Judgment

24 On August 13, 2018, Defendant Foster filed a motion for summary judgment
25 seeking dismissal of all the claims in this case. (ECF No. 20.) On September 4, 2018,
26 Defendants Harkreader, and Legrand filed a Joinder to Defendant Foster's Motion for
27 Summary Judgment (ECF No. 28.) On September 6, 2018, Defendant Olivas also filed a
28

1 Joinder to Defendant Foster's Motion for Summary Judgment. (ECF No. 30). Defendants
2 make a variety of arguments in support of summary judgment.

3 As to the First Amendment Free Exercise Clause and Fourteenth Amendment
4 Equal Protection Clause claims (Count I and II), Defendants assert summary judgment
5 should be granted because: (1) Gates failed to properly exhaust his administrative
6 remedies (ECF No. 20 at pp. 9 – 16); and (2) Defendants Foster, Harkreader, and
7 LeGrand's actions do not rise to the level of personal participation required by a § 1983
8 suit (ECF No. 20 at 16 – 18).

9 As to the Due Process Clause claim (Count III), Defendants assert summary
10 judgment should be granted because: (1) Gates failed to properly exhaust his
11 administrative remedies (ECF No. 20 at pp. 9 – 16); (2) Defendants Foster, Harkreader,
12 and LeGrand's actions do not rise to the level of personal participation required by a §
13 1983 suit (ECF No. 20 at 16 – 18); and (3) Gates was provided adequate due process
14 procedures when he was deprived of his incense. (ECF No. 20 at pp. 19 – 21.) Finally, as
15 to each claim, Defendants argue even if there are issues of fact on the claims in the FAC,
16 Defendants are entitled to qualified immunity. (ECF No. 20 at pp. 21 – 25.)

17 In response, Gates argues summary judgment should be denied. (ECF No. 31).
18 First, as to the First Amendment Free Exercise Clause claim, he argues he did exhaust
19 his available administrative remedies when he "cited...AR 810, made request of Chaplain
20 A. Carrasco and Associate Warden of Programs (A.W.P.) Quentin Byrne who were
21 employed at L.C.C. when these events occurred." (ECF No. 31 at p. 2.) As to the
22 Fourteenth Amendment Equal Protection Clause claim, Gates argues he exhausted his
23 available remedies "because incense were allowed previously and then suddenly
24 denied." (ECF No. 31 at p. 2.) As to the Due Process Clause claim, Gates argues he
25 exhausted:

26 "by stating in the last paragraph [of grievance number 2006-29-84240] 'I
27 am being held to the strictest letter of AP 810 Faith Group Overview. But
28 certain groups such as Kairos Ultrya, Young Men in Christ and Moorish
Science Temple are not even recognized by AP 810 Faith Group
Overview. The practitioners of these groups are allowed chapel time to

1 worship, outside sponsors and to purchase any religious item they want
2 because if they are not recognized by AP 810 Faith Group Overview
3 nothing can be disallowed including, but not limited to, incense.” (ECF No.
31 at p. 3.)

4 In addition, Gates asserts Defendants are not entitled to Qualified Immunity because “a
5 supervisor who is aware of an alleged constitutional violation because he or she reviewed
6 an inmate’s administrative grievance may be liable if he failed to remedy it.” (ECF No. 31
7 at p. 3.)

8 In reply, Defendants assert Gates failed to create any genuine dispute of material
9 fact and presents arguments that are incorrect or irrelevant to the issues presented by
10 Defendants Motion for Summary Judgment. In addition, Defendants assert that Gates
11 fails to address several of their arguments made in the Motion for Summary Judgment.
12 Defendants specifically noted Gates failed to follow the exhaustion requirements laid out
13 in AR 740 and 810 prior to filing his grievance. (ECF No. 33, pp. 5 – 6.) Defendants also
14 reassert Defendants Foster, Harkreader, and LeGrand’s responses to Gate’s grievance
15 does not amount to the level of personal participation required by a § 1983 suit. (ECF No.
16 33, pp. 6 – 7.) Finally, Defendants reiterate qualified immunity should apply in this case.
17 (ECF No. 33, p. 10.)

18 **II. LEGAL STANDARD**

19 Summary judgment allows the court to avoid unnecessary trials. *Nw. Motorcycle*
20 *Ass’n v. U.S. Dep’t of Agric.*, 18 F.3d 1468, 1471 (9th Cir. 1994). The court properly
21 grants summary judgment when the record demonstrates that “there is no genuine issue
22 as to any material fact and the movant is entitled to judgment as a matter of law.”
23 *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986). “[T]he substantive law will identify
24 which facts are material. Only disputes over facts that might affect the outcome of the
25 suit under the governing law will properly preclude the entry of summary judgment.
26 Factual disputes that are irrelevant or unnecessary will not be counted.” *Anderson v.*
27 *Liberty Lobby*, 477 U.S. 242, 248 (1986). A dispute is “genuine” only where a
28 reasonable jury could find for the nonmoving party. *Id.* Conclusory statements,

1 speculative opinions, pleading allegations, or other assertions uncorroborated by facts
2 are insufficient to establish a genuine dispute. *Soremekun v. Thrifty Payless, Inc.*, 509
3 F.3d 978, 984 (9th Cir. 2007); *Nelson v. Pima Cmty. Coll.*, 83 F.3d 1075, 1081–82 (9th
4 Cir. 1996). At this stage, the court’s role is to verify that reasonable minds could differ
5 when interpreting the record; the court does not weigh the evidence or determine its
6 truth. *Schmidt v. Contra Costa Cnty.*, 693 F.3d 1122, 1132 (9th Cir. 2012); *Nw.*
7 *Motorcycle Ass’n*, 18 F.3d at 1472.

8 Summary judgment proceeds in burden-shifting steps. A moving party who does
9 not bear the burden of proof at trial “must either produce evidence negating an essential
10 element of the nonmoving party’s claim or defense or show that the nonmoving party
11 does not have enough evidence of an essential element” to support its case. *Nissan*
12 *Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000). Ultimately, the
13 moving party must demonstrate, on the basis of authenticated evidence, that the record
14 forecloses the possibility of a reasonable jury finding in favor of the nonmoving party as
15 to disputed material facts. *Celotex*, 477 U.S. at 323; *Orr v. Bank of Am., NT & SA*, 285
16 F.3d 764, 773 (9th Cir. 2002). The court views all evidence and any inferences arising
17 therefrom in the light most favorable to the nonmoving party. *Colwell v. Bannister*, 763
18 F.3d 1060, 1065 (9th Cir. 2014).

19 Where the moving party meets its burden, the burden shifts to the nonmoving
20 party to “designate specific facts demonstrating the existence of genuine issues for trial.”
21 *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010) (citation omitted). “This
22 burden is not a light one,” and requires the nonmoving party to “show more than the
23 mere existence of a scintilla of evidence. . . . In fact, the non-moving party must come
24 forth with evidence from which a jury could reasonably render a verdict in the non-
25 moving party’s favor.” *Id.* (citations omitted). The nonmoving party may defeat the
26 summary judgment motion only by setting forth specific facts that illustrate a genuine
27 dispute requiring a factfinder’s resolution. *Liberty Lobby*, 477 U.S. at 248; *Celotex*, 477
28 U.S. at 324. Although the nonmoving party need not produce authenticated evidence,

1 Fed. R. Civ. P. 56(c), mere assertions, pleading allegations, and “metaphysical doubt as
 2 to the material facts” will not defeat a properly-supported and meritorious summary
 3 judgment motion, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–
 4 87 (1986).

5 For purposes of opposing summary judgment, the contentions offered by a *pro se*
 6 litigant in motions and pleadings are admissible to the extent that the contents are based
 7 on personal knowledge and set forth facts that would be admissible into evidence and
 8 the litigant attested under penalty of perjury that they were true and correct. *Jones v.*
 9 *Blanas*, 393 F.3d 918, 923 (9th Cir. 2004).

10 **III. DISCUSSION**

11 **A. Civil Rights Claims under Section 1983**

12 42 U.S.C. § 1983 aims “to deter state actors from using the badge of their authority
 13 to deprive individuals of their federally guaranteed rights.” *Anderson v. Warner*, 451 F.3d
 14 1063, 1067 (9th Cir. 2006) (quoting *McDade v. West*, 223 F.3d 1135, 1139 (9th Cir.
 15 2000)). The statute “provides a federal cause of action against any person who, acting
 16 under color of state law, deprives another of his federal rights[,]” *Conn v. Gabbert*, 526
 17 U.S. 286, 290 (1999), and therefore “serves as the procedural device for enforcing
 18 substantive provisions of the Constitution and federal statutes,” *Crompton v. Gates*, 947
 19 F.2d 1418, 1420 (9th Cir. 1991). Claims under section 1983 require a plaintiff to allege (1)
 20 the violation of a federally-protected right by (2) a person or official acting under the color
 21 of state law. *Warner*, 451 F.3d at 1067. Further, to prevail on a § 1983 claim, the plaintiff
 22 must establish each of the elements required to prove an infringement of the underlying
 23 constitutional or statutory right.

24 Defendants argue they are entitled to summary judgment for several reasons.
 25 First, Defendants argue that Gates failed to properly exhaust his administrative remedies.
 26 (ECF No. 20, at pp. 9 – 16.) Second, Defendants Foster, Harkreader, and LeGrand argue
 27 that their actions do not rise to the level of personal participation required for a § 1983
 28 suit. (ECF No. 20, at pp. 16 – 18.) Third, Defendants argue that Gates was provided

adequate due process procedures when he was deprived of his incense. (ECF No. 20, at pp. 19 – 21.) In the alternative, Defendants argue that they are entitled to qualified immunity. (ECF No. 20, at pp. 21 – 25.) Each of these arguments will be addressed in turn.¹

B. Exhaustion of Administrative Remedies

An inmate alleging a violation of his civil rights pursuant to 42 U.S.C. § 1983 must exhaust the NDOC's administrative remedies prior to seeking judicial relief. *Munoz v. State*, No. 66977, 2015 WL 5516700, at *1 (Nev. App. Sept. 15, 2015) “[P]roper exhaustion of administrative remedies ... means using all steps that the agency holds out, and doing so properly (so that the agency addresses the issues on the merits).” *Woodford v. Ngo*, 548 U.S. 81, 90 (2006) (internal quotation marks omitted). As noted by the court:

The point of the PLRA exhaustion requirement is to allow prison officials a fair opportunity to address grievances on the merits, to correct prison errors that can and should be corrected and to create an administrative record for those disputes that eventually end up in court.”

Reed-Bey v. Pramstaller, 603 F.3d 322, 324 (6th Cir.2010). The Supreme Court held in *Jones v. Bock* that a prison's own grievance process, not the PLRA, determines how detailed a grievance must be to satisfy the PLRA exhaustion requirement. 549 U.S. at 218, 127 S.Ct. 910.

When an NDOC inmate is requesting new or additional religious services or religious property, the inmate must comply with AR 810.3, the Religious Practice Manual, before his or her claim can be considered properly exhausted. *Country Stevens*, 2011 WL 13240356, at *6-*8. To comply with AR 810.3, the inmate must make a written request to the chaplain, and the chaplain will meet with the inmate and, when deemed necessary,

¹ The Court does not reach Defendants' qualified immunity argument because it decides the case based on failure to exhaust, lack of personal participation, and adequate due process procedures.

1 will provide the inmate with a Request for Accommodation of Religious Practice Form
 2 (DOC 3505), which must then be returned to the chaplain. (Doc. # 104-3 at 16.) The
 3 request is reviewed by the Religious Review Team (RRT) (consisting of the warden,
 4 chaplain, and deputy attorney general). (*Id.* at 16-17.) In the event the request is denied,
 5 the inmate must be notified in writing of the decision and reason for denial, and a copy of
 6 the denial is maintained in the inmate's Institutional File which is maintained by the
 7 prison. (*Id.* at 17.) To request a new or additional religious service, the inmate must make
 8 a written request for consideration by the chaplain. (Doc. # 104-3 at 17-18.)

10 The NDOC Religious Practice Manual states:

11 When any group/individual wishes to have the NDOC add new allowable
 12 Faith Group Property and/or Personal Religious Property to the Faith
 13 Group Overview, they must use the process set forth within this section.
 14 This process must be complete before a grievance is filed pursuant to AR
 15 740, Inmate Grievance Procedure. The request must be made in writing
 16 via the Request for Accommodation of Religious Practices Form (DOC
 17 3505). The Request for Accommodation of Religious Practices Form
 18 (DOC 3505) must be fully completed and submitted to the Chaplain with
 all relevant supporting documentation attached (i.e. reasons why the
 item(s) are religious and needed to practice the religion). The
 Chaplain/designee will submit the completed Request for Accommodation
 of Religious Practices From (DOC 3505), and any documentation attached
 thereto, to the Religious Review Team (RRT).

19 (ECF No. 20, at Ex.6, (C)(1) – (3).)

20 1. *Counts I and II*

21 Defendants assert that Gates “put NDOC officials on notice that he was not
 22 permitted to have his incense but did not put NDOC officials on notice that his religious
 23 rights were being violated nor did he put officials on notice that this policy violated the
 24 Equal Protection Clause.” (ECF No. 20 at 11.) However, a grievance need not include
 25 legal terminology or legal theories unless they are in some way needed to provide notice
 26 of the harm being grieved. *Abarra v. State*, 131 Nev. 20, 23, 342 P.3d 994, 996 (2015). A
 27 grievance also need not contain every fact necessary to prove each element of an
 28

1 eventual legal claim. *Abarra*, 131 Nev. at 23, 342 P.3d at 996. The primary purpose of a
2 grievance is to alert the prison to a problem and facilitate its resolution, not to lay
3 groundwork for litigation. See *Johnson v. Johnson*, 385 F.3d at 522, *cited with approval in*
4 *Jones*, 549 U.S. at 219, 127 S.Ct. 910.

5 In Grievance No. 2006-29-84240, Gate's writes, "When a lowly, single stripe
6 officer, a vengeful, retaliatory Sargent and a known religious discriminatory lieutenant
7 overrules an Associate Warden it is a very clear and serious violation of the chain of
8 command." (ECF No. 20, at Ex. 2, p. 3.) In addition, Gates writes, "You also state in your
9 response that AR 810 Faith Group Overview does not allow any Earth Based Religion to
10 purchase incense. But other religions are allowed to purchase incense." (ECF No. 20, at
11 Ex. 2, p. 3.) Although these statements do not explicitly convey that Gates is claiming a
12 religious freedom, or an equal protection violation, there is at least some indication that
13 Gates may have, in fact, filed a grievance pertinent to the facts and allegations within
14 Count I and II. This should be sufficient to allow prison officials a fair opportunity to
15 address the grievance on the merits, and to correct prison errors that could be corrected.
16 In this case, the court disagrees that Gates has failed to put NDOC on notice as to his
17 religious claims.

18 However, even if the Court finds Gates provided NDOC officials with adequate
19 notice regarding Counts I and II, Gates failed to follow NDOC procedures in challenging
20 the NDOC's religious policies. Gates is requesting that NDOC AR 810 be amended to
21 allow Wiccans to possess and use incense in religious ceremonies. Gates was required
22 to file the DOC 3505 before he could go through the grievance process.

23 Gates mentions in Grievance No. 2006-29-84240 that he submitted a DOC 3528
24 which is an "NDOC Religious Property Request Form." (ECF No. 20, at Ex. 2, p. 5.)
25 Gates was, however, incorrect in his belief that this was the proper form as AR 810.3—
26 Religious Practice Manual—requires inmates to submit a Request for Accommodations of
27 Religious Practices Form (DOC 3505) prior to filing a grievance. (ECF No. 20, at Ex. 6, p.
28 14.) While these forms may sound similar, their purposes are distinct, and they cannot be

1 interchanged. In addition, the NDOC Religious Property Request Form (DOC 3528)
2 makes explicitly clear that inmates should “only order items allowed by [their] declared
3 faith” as “failure to follow this procedure may result in a delay or denial of [their] request.”
4 Since amber fragrant resin incense is not on the list of items approved for Wiccans,
5 submitting an NDOC Religious Property Request Form (DOC 3528) was not the proper
6 procedure. Rather, Gates should have filled out a Request for Accommodations of
7 Religious Practices Form (DOC 3505) as outlined in AR 810.3. (ECF No. 20, at Ex. 6, p.
8 14.)

9 As proof that Gates never submitted a DOC 3505, Defendants point out that
10 Chaplain Snyder stated, there is no record of Gates “having submitted a Request for
11 Accommodation of Religious Practices form (DOC 3505) to have amber fragrant resin
12 granular incense approved for his religious practice of being a Wiccan during the period
13 of January 2012 to present.” (ECF No. 20, Ex. 7, ¶13.) As such, the RRT has never
14 reviewed or considered Gates’ request to have incense approved for use by Wiccan faith
15 group members. (*Id.* at ¶14.) Gates never sought approval via the proper channels to
16 have AR 810.1, Faith Group Overview, amended to allow Wiccans the ability to possess
17 and use incense. Gates failed to follow the NDOC’s procedural requirements and did not
18 exhaust his claim for new or additional religious personal property. Gates thus did not
19 properly exhaust Counts I and II.

20 2. Count III

21 Additionally, Defendants assert that Gates did not exhaust Count III because he
22 did not provide NDOC officials with adequate notice regarding his due process claim as
23 alleged. Gates asserts that he did in fact exhaust his administrative remedies as to the
24 alleged due process violation in Grievance No. 2006-29-84240. However, nowhere in
25 Grievance No. 2006-29-84240 does Gates claim that the taking of his incense pursuant
26 to NDOC’s regulations violates the Due Process Clause, nor does Gates complain of the
27 processes provided for inmates to grieve Unauthorized Property Notifications.
28

1 Gates mentions in his grievance that he submitted a request to purchase incense,
 2 his request was approved, when his package arrived, a corrections officer unauthorized
 3 and withheld it, and that he previously purchased incense through the Inmate Canteen.
 4 (ECF No. 20, at Ex. 2, pp. 1 – 10.) Proper notice, however, requires an inmate's
 5 grievance to alert prison officials to "the nature of the wrong for which redress is sought."
 6 *Griffin v. Arpaio*, 557 F.3d 1117, 1120 (9th Cir. 2009). Since Gate's grievance does not
 7 alert prison officials that his due process rights were bring violated, it is insufficient to
 8 provide NDOC officials with adequate notice regarding his due process claim as alleged
 9 in Count III. Thus, Defendants are entitled to summary judgment on Count III because
 10 Gates failed to properly exhaust his administrative remedies. For all the reasons listed
 11 above, the Court recommends that Defendants' Motion for Summary Judgment as to
 12 Count I, II, and III be granted.

13 C. Personal Participation

14 "There are two elements to a section 1983 claim: (1) the conduct complained of
 15 must have been under color of state law, and (2) the conduct must have subjected the
 16 plaintiff to a deprivation of constitutional rights." *Jones v. Cmty. Redevelopment Agency*
 17 *of Los Angeles*, 733 F.2d 646, 649 (9th Cir.1984). A prerequisite to recovery under the
 18 Civil Rights Act, 42 U.S.C. § 1983, is that the plaintiff prove that the defendants deprived
 19 him of a right secured by the Constitution and the laws of the United States. *Gomez v.*
 20 *Whitney*, 757 F.2d 1005, 1006 (9th Cir. 1985). Liability under § 1983 arises only upon a
 21 showing of personal participation by the defendant. *Taylor v. List*, 880 F.2d 1040, 1045
 22 (9th Cir. 1989). A person deprives another "of a constitutional right, within the meaning of
 23 section 1983, if he does an affirmative act, participates in another's affirmative acts, or
 24 omits to perform an act which he is legally required to do that causes the deprivation of
 25 which [the plaintiff complains]." *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988).
 26 "[V]icarious liability is inapplicable to...§ 1983 suits, a plaintiff must plead that each
 27 Government-official defendant, through the official's own individual actions, has violated
 28

1 the Constitution.” *Ashcroft v. Iqbal*, 556 U.S. 662, 676, 129 S. Ct. 1937, 1948, 173 L. Ed.
2 2d 868 (2009).

3 Generally, one cannot state a constitutional claim based on their dissatisfaction
4 with the grievance process. *Grenning v. Klemme*, 34 F. Supp. 3d 1144, 1157 (E.D. Wash.
5 2014) Where the defendant's only involvement in the allegedly unconstitutional conduct is
6 “the denial of administrative grievances or the failure to act, the defendant cannot be
7 liable under § 1983.” *Id.* (quoting *Shehee v. Luttrell*, 199 F.3d 295, 300 (6th Cir.1999)).
8 However, the issue of whether responding to a grievance can rise to the level of personal
9 participation required for a § 1983 claim was addressed in *Snow v. McDaniel*, 681 F.3d
10 978 (9th Cir. 2012)., *overruled on other grounds* in *Peralta v. Dillard*, 744 F.3d 1076 (9th
11 Cir. 2014). In *Snow*, the inmate plaintiff had submitted several grievances about the
12 denial of a recommended hip surgery; there was testimony that the warden and associate
13 warden were aware of the grievances, and that they had reviewed an order stating that
14 the inmate needed a hip replacement. *Snow*, 681 F.3d at 989. Defendants argued that
15 there was no evidence in the record that they were personally involved in any of the
16 medical treatment decisions. *Id.* The Ninth Circuit, however, said that their review of the
17 grievance was sufficient to demonstrate that the warden and associate warden were
18 aware of the inmate’s serious hip condition and failed to act to prevent further harm so
19 that the warden and associate warden were not entitled to summary judgment based on
20 lack of personal participation. *Id.*

21 Foster, Harkreader, and LeGrand’s responses to Gates’ grievances could be
22 sufficient to meet the personal participation required for a § 1983 suit if, through their own
23 individual actions, they violated the Constitution. However, Gates does not allege that
24 Foster, Harkreader, or LeGrand caused the alleged constitutional violations in Counts I,
25 II, or II, only that they denied his grievance. (ECF No. 5 at pp. 6 – 8.) This does not rise to
26 the level of participation required for a § 1983 suit. Based on lack of personal
27 participation, Foster, Harkreader, and LeGrand are entitled to summary judgment on
28 Counts I, II, and III.

1 D. Due Process

2 As the Ninth Circuit has made clear, the state may not take property “ ‘like a thief
3 in the night.’ ” *Lavan v. City of Los Angeles*, 693 F.3d 1022, 1032 (9th Cir.2012) (quoting
4 *Clement v. City of Glendale*, 518 F.3d 1090, 1093 (9th Cir.2008)). Because prisoners
5 have a constitutionally protected interest in their personal property, the Fourteenth
6 Amendment guarantees due process to deprivations of inmate property. *Hansen v. May*,
7 502 F.2d 728, 730 (9th Cir.1974). “An agency, such as the NDOC, violates the Due
8 Process Clause of the Fourteenth Amendment when it prescribes and enforces
9 forfeitures of property ‘[w]ithout underlying [statutory] authority and competent procedural
10 protections.’ ” *Nevada Dep’t of Corrs. v. Greene*, 648 F.3d 1014, 1019 (9th Cir.2011)
11 (quoting *Vance v. Barrett*, 345 F.3d 1083, 1090 (9th Cir.2003)). Because the
12 constitutional violation is the state’s failure to provide due process, rather than the taking
13 or loss itself, “it is necessary to ask what process the State provided, and whether it was
14 constitutionally adequate. This inquiry ... examine[s] the procedural safeguards built into
15 the statutory or administrative procedure effecting the deprivation, and any remedies for
16 erroneous deprivations provided by statute or tort law.” *Zinerman v. Burch*, 494 U.S. 113,
17 125–26 (1990).

18 Although pre-deprivation process is favored where possible, a post-deprivation
19 hearing, or a common-law tort remedy for erroneous deprivation, may satisfy due process
20 in some circumstances. *Id.* at 128. When determining whether post-deprivation remedies
21 preclude liability under the Fourteenth Amendment, courts distinguish between
22 unauthorized deprivations and authorized, intentional deprivations. Neither negligent nor
23 intentional unauthorized deprivations of property by prison officials are actionable under §
24 1983 when the state provides a post-deprivation remedy. *Hudson v. Palmer*, 468 U.S.
25 517, 533 (1984); *Quick v. Jones*, 754 F.2d 1521, 1524 (9th Cir.1985). In contrast, an
26 authorized, intentional deprivation of property is actionable under the Due Process
27 Clause, irrespective of post-deprivation remedies. “Authorized” deprivations are those
28 carried out pursuant to a state’s established procedures, regulations, or statutes, see

1 *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 435–36 (1982), and also those conducted
2 under the apparent authority of state procedures, regulations, or statutes, see *Piatt v.*
3 *MacDougall*, 773 F.2d 1032, 1036 (9th Cir.1985).

4 Even if the Court determined that Gates did exhaust his remedies as to Count III,
5 Defendants are still entitled to summary judgement because Gates was provided
6 adequate due process protections when his incense was deemed unauthorized by NDOC
7 officials and confiscated. Gate's Grievance No. 2006-29-84240 requests only that the
8 incense be returned as he believes he was permitted to purchase and possess the
9 incense. (Ex. 2 at 8, 10-11.) Gates is thus grieving the taking of the incense, but not any
10 of the processes or regulations permitting the confiscation of the incense. Even
11 acknowledging as much, a due process claim does not concern the taking of property,
12 but instead the processes allowing the taking of property and the adequacies of those
13 processes.

14 In *Reece*, this Court held that NDOC AR 711 and AR 711.01 and the procedures
15 outlined therein satisfy due process requirements. *Reece v. Shepherd*, No. 3:14-CV-
16 00192-MMD-VPC, 2015 WL 5813243, at *4. This Court held that AR 711.01's procedures
17 of notifying the inmate with an Unauthorized Property Notification and providing the
18 inmate options in disposing of the property or appealing the Unauthorized Property
19 Notification via the grievance process satisfies due process protections. *Id.* "No differently
20 than held the *Greene* court, an opportunity to use the NDOC's grievance process in such
21 circumstances 'is all the process that is due.'" *Id.* (quoting *Greene*, 648 F.3d at 1019).
22 Because such deprivations are authorized by state law (and thus cannot be cured by
23 post-deprivation remedies), the process outlined in AR 711—namely, utilization of AR
24 740's grievance procedures—provides critical procedural protections to inmates well in
25 advance of the final confiscation or destruction of personal items. Due process requires
26 nothing more. *Reece*, 2015 WL 5813243, at *5.

27 Thus, the procedures provided to Gates, as outlined in AR 711 and 711.01, have
28 been found to satisfy due process requirements. Further, in Grievance No. 2006-29-

84240, Gates doesn't even reference the procedures allowing the deprivation of property nor does he make any references to the constitutional adequacies of those procedures. Accordingly, Gates did not grieve, let alone exhaust, his due process claim as alleged in Count III. Since officials made available to Gates adequate procedural protections by which he could have contested the decision to deem the property unauthorized, Count III must be dismissed pursuant to the PLRA and Defendants are entitled to summary judgment as a matter of law.

IV. CONCLUSION

Based upon the foregoing, the Court recommends that Defendants' motion for summary judgment, and the joinders thereto, be granted. The parties are advised:

1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of Practice, the parties may file specific written objections to this Report and Recommendation within fourteen days of receipt. These objections should be entitled "Objections to Magistrate Judge's Report and Recommendation" and should be accompanied by points and authorities for consideration by the District Court.

2. This Report and Recommendation is not an appealable order and any notice of appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District Court's judgment.

V. RECOMMENDATION

IT IS THEREFORE RECOMMENDED that Defendants' motion for summary judgment and the joinders thereto (ECF Nos. 20; 28; 30) be **GRANTED**; and

IT IS FURTHER RECOMMENDED that judgment should be entered accordingly.

DATED: January 28, 2019.


UNITED STATES MAGISTRATE JUDGE